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No. ----------

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

BUDDIES SUPERMARKETS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Buddies Supermarkets, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported at 192 N.L.R.B. No. 143. The per curiam enforcement of the Board's order without opinion is as yet unreported (App. A, *infra*, p. 9).

Jurisdiction

The judgment of the Court of Appeals was entered on July 7, 1972 (App. B, *infra*, p. 10), and petitioner's timely petition for rehearing was denied without opinion September 1, 1972 (App. C, *infra*, p. 12). Juris-

diction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160).

Questions Presented

1. Whether the Board can order petitioner to post notices in its 53 retail stores in Dallas and Tarrant Counties, Texas, when the complaint upon which petitioner was tried expressly limited its scope to 12 stores and stated that they were the "only facilities involved in this proceeding" and when unfair labor practices were found to have occurred at only 2 of the 12 stores.

2. Whether as a matter of law the Board can order petitioner to take affirmative remedial action by posting notices in its retail grocery stores which were expressly excluded from the scope of the complaint upon which petitioner was tried.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq*), are as follows:

> Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. ****
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon

such person a complaint stating the charges in that respect, ****

(c) **** If upon the preponderance of the testimony taken the Board shall be of the opinion that a person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action *** as will effectuate the policies of this Act; **** In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties *** such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) *** No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. ****.

Statement of the Case

Petitioner operated 53 retail food supermarkets in Dallas and Tarrant Counties, Texas. In an amended consolidated complaint as further amended at the Board hearing petitioner was charged with having committed unfair labor practices at 12 of its supermarkets. The complaint alleged "The Respondents' retail stores numbered 3, 5, 10, 24, 25, 28, 30, 38, 49 and 54, Farmer's Fine Food No. 138, and Foodway No. 149, herein referred to as its facilities, *are the only facilities involved in this proceeding.*" (Emphasis added)

As ultimately found by the Board unfair labor practices occurred at only two of the twelve specified stores.[1]

The Trial Examiner's order as adopted by the Board provided in pertinent part, that petitioner should,

> "(a) Post at its stores in Dallas and Tarrant Counties, Texas, copies of the attached notice marked 'Appendix A' ***."

Prior to the Board's adoption of the Trial Examiner's Order petitioner had timely excepted and objected to that portion of it (App. D, *infra*, p. 13).

The scope and breadth of the Board's order was challenged by petitioner before the Court of Appeals. The Board countered by erroneously asserting in its reply brief that the posting issue was not properly be-

[1]Buddies Store No. 25 at Everman and Farmer's Fine Food Store No. 138 at Fort Worth, both of which are in Tarrant County, Texas.

fore the Court of Appeals because petitioner had not excepted to the posting requirement in the Trial Examiner's recommended order.

Reasons for Granting the Writ

The Court of Appeals in this case denied petitioner and the Board the benefits and elucidation that would flow from the court's opinion on the merits or on petitioner's petition for rehearing. The effect of the Court of Appeals' action is to sustain and enforce the Board's order directing petitioner to post notices in its 53 retail food stores in Dallas and Tarrant Counties, Texas, when the complaint upon which petitioner was tried was expressly confined to 12 identified stores and when unfair labor practices were found to have occurred in only 2 of the identified stores. This action puts the Court of Appeals' decision in conflict with the decisions of other Courts of Appeals as hereinafter noted.

In *Bakery Wagon Drivers and Salesmen, Local Union No. 484, v. N.L.R.B.*, 321 F.2d 353, 356 (CADC, 1963) the court stated that no one would dispute the general proposition that one cannot be found guilty of an offense not encompassed by the complaint.

Pertinent is the statement of the First Circuit in *N.L.R.B. v. H. E. Fletcher Co.* 298 F.2d 594, 600 (C.A. 1, 1962),

> "In sum, the Board made a finding of a violation which was neither charged in the complaint nor litigated at the hearing.
>
> "We believe that it would derogate elemental

> concepts of procedural due process to grant enforcement to such a finding. As was stated in Douds v. International Longshoremen's Ass'n., 241 F.2d 278, 283 (2 Cir. 1957): 'The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing.' Where the Board improperly makes its finding or a charge not contained in the complaint, and the record discloses that the basis of this finding has not been litigated at the hearing, such finding is not entitled to enforcement."

In *N.L.R.B. v. Consolidated Machine Tool Corporation*, 163 F.2d 376, 379 (C.A. 2, 1947) Justice Swan, speaking for the Second Circuit, said,

> "In one respect, however, we think the order was too broad. Paragraph 1(b) should be limited by inserting the adjective 'pattern-maker' before the word 'employees' and a corresponding change made in the notice required to be posted. There was no evidence whatever of interference with employees other than those in the pattern-makers unit and no hostility to the Association's efforts to organize the other unit. The injunction should not go beyond the threatened danger. See May Department Stores Co. v. National Labor Relations Board, 326 U.S. 376, 392, 66 S. Ct. 203, 90 L. Ed. 145."

The Sixth Circuit in *N.L.R.B. v. Guernsey-Muskingum Electric Co-op, Inc.*, 285 F.2d 8, 13 (C.A. 6, 1960), where the Board found the respondent in violation of Section 8(a)(3) without having alleged such

a violation in the complaint said,

> "There was no charge in the complaint that subsection (3) was violated. Without a basic charge of such a violation the Board could have acquired no jurisdiction to make that finding. Even though no specific objection was made to the finding it cannot be sustained. There is *no* evidence to support it."

The Fourth Circuit has held that the scope of the Board's order should be limited to the plant involved in the proceeding, *N.L.R.B. v. American Oil Company, Inc. (Curtis Bay Plant)* 114 F.2d 1009 (C.A. 4, 1940).

Not only is the decision of the Fifth Circuit at variance with the decisions of Courts of Appeals, but it is also in conflict with its own prior decisions.

Judge Hutcheson speaking for the Fifth Circuit in *N.L.R.B. v. Ford Motor Co.*, 119 F.2d 326, 330 (C.A. 5, 1941) said,

> "The authorities have settled it that by proceedings of this kind, the Board does not acquire a general supervisory jurisdiction over the one complained against to be enforced by contempt orders, but only a jurisdiction as to the subject matter of the complaint. Globe Cotton Mills v. N.L.R.B., 5 Cir., 103 F.2d 91; N.L.R.B. v. Sands Manufacturing Co., 306 U.S. 532, 59 S. Ct. 508, 83 L.Ed. 682; N.L.R.B. v. Express Publishing Co., 61 S. Ct. 693, 85 L.Ed. ...."

Citing the *Ford Motor Co.* case Judge Hutcheson in *Shell Oil Co. v. N.L.R.B.* 196 F.2d 637, 639 (C.A. 5, 1952), restricted the Board's order to the plant at which the unfair labor practice occurred.

In *Globe Cotton Mills v. N.L.R.B.* 103 F.2d 91, 93 (C.A. 5, 1939) Judge Sibley wrote,

> "The order of the Board is analogous to an injunction or a restraining order, and may not be rightly issued by the Board or enforced by this Court touching a matter not complained of or as to which the evidence shows neither a past nor a threatened wrongdoing. Securities & Exchange Commission v. Torr, 2 Cir., 87 F.2d 446; Teller v. United States, 8 Cir., 113 F.2d 463. The required notice emphasizes and aggravates the injustice, for the promise therein to desist implies an acknowledgment that the Mills had done what they have not done."

The issue here presented is of important and far reaching import in the administration of the Act and should be resolved.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Karl H. Mueller
Harold E. Mueller
Attorneys for Petitioner

MUELLER & MUELLER
502 Burk Burnett Building
Fort Worth, Texas 76102

November, 1972.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1101

Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BUDDIES SUPERMARKETS, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(June 15, 1972)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

---

*Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al, 5th Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1101

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BUDDIES SUPERMARKETS, INC.,
Respondent.

JUDGMENT

Before: WISDOM, GODBOLD and RONEY, Circuit Judges.

THIS CAUSE was submitted to this Court upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Buddies Supermarkets, Inc., its officers, agents, successors, and assigns on August 24, 1971. The Court, having carefully considered the transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on June 15, 1972, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Order of the National Labor Relations Board in said proceed-

ing be enforced and that Buddies Supermarkets, Inc., its officers, agents, successors, and asigns, abide by and perform the directions of the Board in said order contained.

A true copy
Test:
EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals,
Fifth Circuit

/s/CLARE F. SACHS
By Clare F. Sachs
Deputy
New Orleans, Louisiana
September 11, 1972

ENTERED: July 7, 1972
ISSUED AS MANDATE: September 11, 1972

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK
ROOM 408-400 ROYAL ST.

NEW ORLEANS, LA. 70130
(504) 527-6514

September 1, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 72-1101 — National Labor Relations Board vs. Buddies Supermarkets, Inc.

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ALVIS M. WINCHESTER
By Alvis M. Winchester
Deputy Clerk

/amw
cc: Mr. Harold E. Mueller
Mr. Marcel Mallet-Prevost
Mr. Elmer P. Davis

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CASES NOS. 16-CA-3973
16-CA-4043
16-RC-5418

BUDDIES SUPERMARKETS, INC.
AND
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO, LOCAL 368

RESPONDENT'S EXCEPTIONS AND OBJECTIONS TO THE TRIAL EXAMINER'S DECISION

Respondent, Buddies Supermarkets, Inc., excepts and objects to the Trial Examiner's Decision and Recommendations in the particulars and for the reasons hereinafter set forth.

* * * * *

2.

Of the 788 employees in 53 stores involved in the instant proceedings and excepting only certain alleged unlawful statements in the speech of Pace and Berman (to be considered presently) the only unlawful pre-election conduct attributed to respondent by the Examiner involved just *one* part-time school boy employee — Behrens, in a single country store — #25 in

Everman, Texas (R. 283-284, 301), and as to all other employees and in all other stores respondent's conduct did not contravene the Act. The Examiner erred in not so finding.

* * * * * (p. 2)

6.

The sole unfair labor practice found by the Examiner to have been committed after the September 3 election involved one part-time 17-year-old school boy employee — Tom Crutsinger and the manager of the store in which he was employed — Gene Roe (R. 83-84, 85).

* * * * * (p. 12)

9.

The Order recommended by the Examiner other than for the dismissal of the complaint is not supported by substantial evidence on the entire record and is contrary thereto and to the law in each of its several particulars including Appendix A (TX p. 24, lines 9-48, p. 25, lines 1-29, 36-45).

(p. 15)

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-767

BUDDIES SUPERMARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board found that petitioner ("the Company") violated Section 8(a)(1) of the National Labor Relations Act (Pet. 2) by warning employees that selection of the Retail Clerks International Association ("the Union") could result in discharges and a reduction of work hours; admonishing an employee to remove his union button or risk discharge; questioning employees as to how they voted in a Board-conducted representation election; and threatening changes in working conditions in reprisal for the employees' support of the Union (A. 2-6, 39-40).[1] The

[1] "A." refers to the appendix to the briefs in the court of appeals.

Board ordered the Company to cease and desist from the unfair labor practices found and to post appropriate notices at its stores in Dallas and Tarrant Counties, Texas (A. 4, 6–8, 47–49).[2] The court of appeals enforced the Board's order (Pet. App. 9).

2. Petitioner does not contest the Board's findings that it violated Section 8(a)(1) of the Act. Petitioner's sole contention is that the Board improperly ordered it to post notices to its employees in all of its retail stores in Dallas and Tarrant Counties, Texas, when unfair labor practices were found to have occurred in only certain of these stores. This issue does not warrant further review. In any event, petitioner failed to file with the Board an exception to the posting requirement contained in the Trial Examiner's recommended order, and accordingly judicial review of that issue is foreclosed.[3] Petitioner excepted to the Trial Examiner's order only on the ground that it "is not supported by substantial evidence on the entire record and is contrary thereto and to the law in each of its several particulars including Appendix A [the notice to employees]" (Pet. App. 14). This failed to provide adequate notice to the Board that the Company intended to contest the breadth of the posting requirement. See *Marshall Field &*

[2] The Company has 53 stores in those counties. All of these stores were involved in the representation election which was set aside by the Board because of the unfair labor practices found herein and other objectionable conduct. (A. 10, 11–12, 40–46.)

[3] Section 10(e) of the Act provides, in part, that "No objection that has not been urged before the Board * * * shall be considered by the court [of appeals] * * *."

Co. v. *National Labor Relations Board*, 318 U.S. 253, 255; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973